

Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

STATE OF WASHINGTON, et al.,

Defendants.

No. C70-9213 RSM

Subproceeding No. \_\_\_\_\_

MAKAH INDIAN TRIBE'S REQUEST  
FOR DETERMINATION RE QUILEUTE  
AND QUINAULT USUAL AND  
ACCUSTOMED FISHING GROUNDS  
IN THE PACIFIC OCEAN

1. Request for Determination. Plaintiff-Intervenor Makah Indian Tribe ("Makah") requests a determination of the usual and accustomed fishing grounds of Plaintiff-Intervenor Quileute Indian Tribe ("Quileute") and Plaintiff-Intervenor Quinault Indian Nation ("Quinault") in the Pacific Ocean, to the extent not specifically determined by Final Decision # I.

2. Jurisdiction. The Court has jurisdiction to make the requested determination pursuant to Paragraphs 25(a)(1) and 25(a)(6) of the Court's March 24, 1974, permanent injunction (384 F. Supp. at 419), as modified by the Court's Order Modifying Paragraph 25 of Permanent Injunction (Doc. No. 13599) dated August 23, 1993.

3. Factual and Legal Basis of the Request for Determination.

a. Prior Judicial Determinations of Usual and Accustomed Fishing Grounds in the Pacific Ocean.

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i. In Final Decision # I, the Court determined that Makah, Quileute and Quinault had usual and accustomed fishing grounds in the Pacific Ocean.<sup>1</sup> It determined that Makah's usual and accustomed fishing grounds "included the waters of the Strait of Juan de Fuca . . . extending out into the ocean to an area known as Swiftsure and then south along the Pacific coast to an area intermediate to Ozette village and the Quileute Reservation," as well as certain rivers and lakes. 384 F. Supp. at 364 (FF 65). The Court determined that Quileute usual and accustomed grounds included certain rivers, lakes and streams and "the adjacent tidewater and saltwater areas." 384 F. Supp. at 372 (FF 108). And, the Court determined that, in addition to certain rivers, lakes and streams, Quinault utilized "ocean fisheries" in "the waters adjacent to its territory." 384 F. Supp. at 374 (FF 120).

ii. The Court did not define the precise boundaries of these Pacific Ocean usual and accustomed fishing grounds in Final Decision # I. Moreover, the Court's decision was limited to waters within the jurisdiction of the State of Washington, *i.e.*, to waters within three miles of shore. 384 F. Supp. at 400 (CL 7).

iii. After Final Decision # I, Makah invoked the Court's continuing jurisdiction to seek a determination that its usual and accustomed fishing grounds extended far offshore and a precise definition of the boundaries of those grounds. In 1982, the Court determined that Makah's usual and accustomed fishing grounds extended approximately 40 miles offshore and were bounded on the west by longitude 125° 44' W. and on the south by a

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<sup>1</sup> The Court also determined that the Hoh Indian Tribe ("Hoh") had usual and accustomed fishing grounds in the Pacific Ocean. Because Hoh is not exercising or threatening to exercise its fishing rights in a manner that injures Makah, Makah is not seeking a determination of the location of Hoh's Pacific Ocean usual and accustomed fishing grounds in this subproceeding.

1 line drawn westerly from the Norwegian Memorial along latitude 48° 2' 15" N. 626 F. Supp. at  
 2 1467. The Court's determination was affirmed by the Ninth Circuit Court of Appeals. 730 F.2d  
 3 1314.

4 iv. Neither Quileute nor Quinault has sought a judicial determination of the  
 5 offshore extent of its usual and accustomed fishing grounds in the Pacific Ocean or a precise  
 6 definition of the boundaries of those grounds. Except as otherwise noted below, the Court has  
 7 made no such determination.  
 8

9 b. Treaty Fishing Areas Specified in Federal Regulations.

10 i. The Secretary of Commerce, acting through the National Marine  
 11 Fisheries Services ("NMFS"), has promulgated regulations that specify boundaries in which  
 12 Makah, Quileute and Quinault may exercise treaty rights to fish for salmon, halibut, groundfish,  
 13 and highly migratory species in the Pacific Ocean. The boundaries of the Makah fishing area in  
 14 the NMFS' regulations are based on Makah's adjudicated usual and accustomed fishing  
 15 grounds. However, the boundaries of Quileute and Quinault's fishing areas in the NMFS'  
 16 regulations are not based on a determination of those tribes' respective usual and accustomed  
 17 fishing areas, but are an interim accommodation to Quileute and Quinault pending a judicial  
 18 determination of those boundaries.  
 19

20 ii. Non-treaty fishing organizations challenged NMFS' regulatory  
 21 boundaries in a case involving the Pacific whiting fishery. Quileute and Quinault submitted  
 22 amicus briefs in this Court and in the Ninth Circuit Court of Appeals in which they argued: (1)  
 23 the plaintiffs did not have standing to challenge NMFS' regulatory boundaries for their fishing  
 24 areas because NMFS had not allocated Pacific whiting to them; and (2) even if the plaintiffs had  
 25

standing, the courts could only determine whether NMFS' regulatory boundaries were a reasonable accommodation of their treaty right, leaving an actual determination of their usual and accustomed grounds to the Court in *United States v. Washington*. Without addressing the plaintiffs' standing, the District Court upheld NMFS' regulatory boundaries as reasonable in the absence of any judicial determination in *United States v. Washington* to the contrary. On appeal, the Ninth Circuit held that the plaintiffs did not have standing to challenge the regulatory boundaries for the Quileute or Quinault fishing areas because NMFS had not allocated any Pacific whiting to Quileute or Quinault. (Both the District Court and the Ninth Circuit upheld NMFS' regulatory boundaries for Makah's treaty fishing area.)

iii. NMFS itself has stated repeatedly that its regulatory boundaries are not intended to establish usual and accustomed areas for purposes of *United States v. Washington* and are subject to revision based on a judicial determination of such areas in *United States v. Washington*. In the case referenced in the preceding paragraph, NMFS entered into a stipulation with the State of Washington in which NMFS stated that its regulatory boundaries are not intended to and do not prejudice the court proceedings in *United States v. Washington* and do not have any presumptive or precedential effect on any future or concurrent litigation in *United States v. Washington* to establish Quileute's or Quinault's usual and accustomed fishing grounds.

iv. The western boundary of Quileute and Quinault fishing areas in the NMFS' regulations, in particular, was drawn by extending the adjudicated western boundary of Makah's usual and accustomed grounds (longitude 125° 44' W.) due south, and was not based on any determination of Quileute's or Quinault's actual usual and accustomed fishing grounds.

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(Because of the shape of the coast, this boundary is approximately 40 to 50 miles offshore in the Quileute area and approximately 50 to 60 miles offshore in the Quinault area; in both cases it is farther offshore than in the Makah area.) Quileute and Quinault themselves have asserted that there was no factual basis for the western boundary established in the NMFS' regulations for their fishing areas and that the determination in the Makah case had no factual relevance to Quileute and Quinault usual and accustomed fishing grounds.

v. In Subproceeding 96-1, in a joint preliminary injunction motion filed with Makah and Hoh, Quinault argued Quileute was fishing for black cod in Pacific Ocean areas south of Quileute's adjudicated usual and accustomed fishing grounds, even though it was fishing within NMFS' regulatory boundaries. Quinault argued that any reliance on NMFS' regulatory boundaries would be misplaced because it was the province of the Court to construe its judgment to give effect to the Court's original intention and because NMFS itself had been careful to note that its recognition of tribal fishing areas was subject to revision by the Court. In its ruling on the motion for preliminary injunction, the Court found Quinault had raised serious questions on the merits of this claim. However, the Court did not make a final determination of the matter because the subproceeding was settled after entry of the Court's preliminary injunction.

c. The Pacific Whiting Fishery.

i. Makah developed a treaty fishery for Pacific whiting beginning in 1996. Since then, Makah has been and remains the only tribe participating in the Pacific whiting fishery. Throughout this period, NMFS has made annual or biennial allocations or set-asides of Pacific whiting based on requests from Makah to accommodate the needs of the Makah fishery.

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1 NMFS has determined that the amounts requested by Makah were within the scope of Makah's  
 2 treaty entitlement based on the availability of Pacific whiting within Makah's adjudicated usual  
 3 and accustomed fishing grounds. This Court and the Ninth Circuit Court of Appeals have  
 4 affirmed NMFS' determination.

5  
 6 ii. Makah intensively manages its Pacific whiting fishery. The Tribe  
 7 requires the presence of two observers on the at-sea mothership and a full-time port observer at  
 8 the onshore plant that process fish harvested in the Tribe's fishery. To reduce bycatch of  
 9 chinook salmon listed under the Endangered Species Act and Pacific coast rockfish stocks  
 10 declared overfished under the Magnuson-Stevens Act, the Tribe requires the use of salmon  
 11 excluder devices, conducts test fisheries to determine whether bycatch is low enough to open its  
 12 fishery, restricts night fishing, immediately closes areas to fishing in which bycatch rates are  
 13 high, and requires full retention and surrender of all overfished rockfish. All of these measures  
 14 slow the harvest of Pacific whiting. In addition, Makah coordinates openings in the fishery to  
 15 accommodate the fishing schedules of the Makah catcher boats and the mothership in Alaska  
 16 pollock fisheries.

17  
 18 iii. In early 2008, Quileute and Quinault informed NMFS that they intended  
 19 to participate in the Pacific whiting fishery. In written and oral communications since then,  
 20 Quileute and/or Quinault have taken the following positions (among others): (1) they are  
 21 entitled to harvest a portion of any Indian treaty allocation or set-aside in the Pacific whiting  
 22 fishery, even if the allocation or set-aside is based on a request from Makah and is designed to  
 23 meet the needs of the established Makah fishery; (2) NMFS has no legal authority to make, and  
 24 Quileute and Quinault will not agree to, separate allocations or set-asides for each tribe in the  
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1 Pacific whiting fishery; (3) because Pacific whiting migrate from south to north in the spring,  
 2 Quileute and Quinault intend to harvest Pacific whiting before they reach Makah fishing  
 3 grounds, thereby preempting the Makah fishery; and (4) Quileute and Quinault intend to begin  
 4 participating in the Pacific whiting fishery in 2009 or 2010, and ultimately expect to have five  
 5 or six catcher boats each, with an anticipated annual harvest ranging from 35,000 to 42,000  
 6 metric tons per tribe.  
 7

8           iv. Quileute's and Quinault's intent to participate in the Pacific whiting  
 9 fishery in the manner described above threatens imminent harm to the established Makah  
 10 fishery. Even if NMFS were to increase the overall Indian treaty allocation, the harvest strategy  
 11 and harvest levels proposed by Quileute and Quinault would result in a substantial reduction of  
 12 the Makah harvest. Moreover, by forcing Makah into a race to harvest Pacific whiting, Quileute  
 13 and Quinault would force Makah to fish earlier in the year, when bycatch of listed chinook  
 14 salmon and overfished rockfish stocks is higher, and would undermine Makah's entire  
 15 management strategy for reducing bycatch. Increased bycatch of these stocks would have  
 16 adverse effects on conservation of fishery resources and could trigger the need for allocations of  
 17 these stocks between treaty and non-treaty fisheries, resulting in further restrictions on the treaty  
 18 fishery. And, by forcing Makah into a race to harvest Pacific whiting, Quileute and Quinault  
 19 would prevent Makah from being able to accommodate the fishing schedules of the catcher  
 20 boats and processors in its fishery.  
 21  
 22

23           v. In response to Quileute's and Quinault's stated intent to enter the Pacific  
 24 whiting fishery, NMFS has begun a process to determine the overall Indian treaty allocation in  
 25 the Pacific whiting fishery. That determination depends on the availability of Pacific whiting in  
 26

1 the Tribes' usual and accustomed fishing grounds, and thus depends on a determination of the  
 2 location of those grounds.

3 vi. Makah representatives met with Quileute and Quinault representatives on  
 4 several occasions in May 2008 and explained Makah's concerns regarding the manner in which  
 5 Quileute and Quinault proposed to enter the Pacific whiting fishery. Makah requested that  
 6 Quileute and Quinault each provide a reasonable estimate of their anticipated Pacific whiting  
 7 harvests and proposed that the Tribes seek separate allocations or set-asides to meet the needs of  
 8 their respective fisheries. Quileute and Quinault repeatedly rejected these proposals.

10 vii. In June 2008, through a public submission to the Pacific Fishery  
 11 Management Council, Makah informed Quileute and Quinault that the manner in which they  
 12 proposed to participate in the Pacific whiting fishery and their threats to preempt the established  
 13 Makah fishery would trigger the need for a judicial determination of their adjudicated usual and  
 14 accustomed fishing grounds in the Pacific Ocean. Quileute and Quinault have not modified the  
 15 manner in which they intend to participate in the Pacific whiting fishery or their threats to  
 16 preempt the established Makah fishery since then. Although they have not participated in the  
 17 2009 fishery to date, Quileute stated at various times that it would have from one to four catcher  
 18 boats in the 2009 fishery, and is now projecting that it will have one or two catcher boats in the  
 19 2010 fishery. Neither Quileute nor Quinault have modified their long term projections of each  
 20 having five or six catcher boats in the fishery, with annual harvests of 35,000 to 42,000 metric  
 21 tons per tribe.  
 22  
 23

24 viii. In September 2009, the Makah Tribal Council sought a meeting with the  
 25 Quileute and Quinault Tribal Councils to discuss and seek to resolve Makah's concerns over the



1 manner in which Quileute and Quinault intend to participate in the Pacific whiting fishery. In  
2 seeking the meeting, Makah again informed Quileute and Quinault that the manner in which  
3 they were proposing to participate in the fishery would trigger the need for a judicial  
4 determination of their usual and accustomed fishing grounds in the Pacific Ocean. Quinault  
5 responded that it was unavailable on the dates proposed by Makah and has not proposed an  
6 alternative date. Quileute proposed a date for such a meeting, to which Makah agreed, but  
7 Quileute then canceled the meeting and has not sought to reschedule it. Makah has made other  
8 efforts to address its concerns, including the meeting described in the Declaration of Marc D.  
9 Slonim which is filed herewith, but they too have been unsuccessful.

11 ix. In response to the threat posed by Quileute's and Quinault's stated intent  
12 to participate in the Pacific whiting fishery in the manner described above, Makah has  
13 assembled archaeological, anthropological, historical and ethnographic information regarding  
14 Quileute and Quinault treaty-time fishing grounds. The information available to Makah  
15 indicates that Quileute and Quinault usual and accustomed grounds are much less extensive than  
16 the fishing areas described in NMFS' regulations. In particular, the western boundary of both  
17 Quileute and Quinault usual and accustomed grounds appears to be approximately 5 to 10 miles  
18 offshore, and the northern boundary of Quileute usual and accustomed grounds in the Pacific  
19 Ocean appears to be a line drawn westerly from the vicinity of the Norwegian Memorial.

22 x. Given the migratory and schooling patterns of Pacific whiting, if Quileute  
23 and Quinault were limited to the usual and accustomed fishing grounds described in the  
24 preceding paragraph, they would not be able to preempt or otherwise threaten the established  
25 Makah fishery for Pacific whiting.

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d. Other Fisheries. On the basis of the information Makah assembled in response to the threat posed by Quileute's and Quinault's intent to participate in the Pacific whiting fishery in the manner described above, it appears that Quileute and Quinault have authorized and currently are conducting fisheries for salmon, halibut and black cod outside of their actual usual and accustomed fishing areas. Although Makah, Quileute and Quinault have been able to resolve disputes over these fisheries in the past, the Quileute and Quinault fisheries for these species compete directly with Makah fisheries for the same species.

4. Relief Sought. Makah requests that the Court determine the boundaries of Quileute and Quinault usual and accustomed fishing grounds in the Pacific Ocean. In particular, it requests that, on the basis of the evidence presented at trial and applicable law, the Court define the western boundary of such areas, which Makah currently believes is approximately 5 to 10 miles offshore, and the northern boundary of Quileute usual and accustomed fishing grounds, which Makah currently believes is a line drawn westerly from the vicinity of the Norwegian Memorial.

Dated: December 4, 2009.

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